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Discharge of a Contract where Both Parties are in Breach: Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd

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Case Note

DISCHARGE OF A CONTRACT WHERE BOTH PARTIES ARE IN BREACH

Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd **[2009] 4 SLR(R) 602**

This case note examines the most recent attempt by the Court of Appeal to provide further guidance on: (a) how the doctrine of discharge of contract by breach operates when both parties are in breach of their contract obligations; and (b) when a promisee is entitled to rely on an alternate basis to justify its election to discharge a contract for the promisor's breach when the basis originally relied upon and communicated to the promisor is ultimately found to be legally insufficient.

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1 In *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd*[1] ("*Alliance Concrete*"), the Court of Appeal had the opportunity to address some less commonly encountered questions associated with the doctrine of discharge of contract for breach. *Inter alia*, it revisited the issue of discharge of contract when both contracting parties are in breach of contract. It also had the opportunity to elaborate upon the manner by which a court is to determine whether breach of a particular term gives rise to the right to discharge the contract for such breach, variously outlined in cases such as *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd*[2] ("*RDC Concrete*"), *Man Financial (S) Pte Ltd v Wong Bark Chuan David*,[3] and most recently, in *Sports Connection Pte Ltd v Deuter Sports GmbH*[4] ("*Sports Connection*"). As will be noted later, the grounds of decision handed down by the Court of Appeal in *Alliance Concrete*

* Thanks are owed to the very helpful comments of the anonymous referee. All errors, of course, remain my own.
1 [2009] 4 SLR(R) 602.
2 [2007] 4 SLR(R) 413.
3 [2008] 1 SLR(R) 663.
4 [2009] 3 SLR(R) 883.

approximately two months after it had handed down its decision in *Sports Connection* do not avert to the tantalising developments hinted at in the earlier case.[5] The "true" position so far as Singapore law is concerned, as to the inter-relationship between the "condition-warranty" approach and the *Hongkong Fir*[6] "innominate term" approach remains, it would seem, somewhat uncertain.

2 Alliance Concrete Singapore Pte Ltd, the appellant, was in the business of fabricating and supplying ready-mixed concrete for the construction industry, while Comfort Resources Pte Ltd, the respondent, was a supplier of sand. The appellant contracted to purchase sand over a period of one year, from 1 February 2006 to 31 January 2007, from the respondent. The business relationship was not untroubled. There were allegations of late payments, short deliveries, and orders of sand below the contractually stipulated monthly minimum.

3 On 15 September 2006, the respondent commenced an action against the appellant for the sum of $401,448.79, being the price of sand it had sold and delivered to the appellant and which was due and owing. It also claimed for damages for loss of profits for sand that the appellant ought to have ordered (as the contract required a minimum quantity to be ordered every month); another, slightly different question. Further, the respondent claimed that these failures on the part of the appellant demonstrated an intention on the appellant's part to no longer be bound by the contract and that the appellant's failures amounted to repudiatory breaches of the contract. This provided legal justification for the respondent's election to discharge the contract as at 14 September 2006, and therefore also entitled the respondent to damages for loss suffered as a result of such premature termination of the contract. The very same day, the appellant commenced a separate suit, claiming $1,162,984.87 or, alternatively, damages for losses arising from the respondent's breach of contract through its suspension of deliveries of sand with effect from 20 July 2006 despite the appellant's continued orders for sand beyond that date, and for having unjustifiably terminated the contract.

4 At trial, the respondent was awarded final judgment on its claim, with damages to be assessed on the basis that the appellant ought to have ordered at least 40,000mt of sand every month, whereas the appellant's claim was dismissed (*Comfort Resources Pte Ltd v Alliance*

5 Some of the possible implications of *Sports Connection* are discussed in C H Tham & P W Lee, "Contract" (2009) 10 SAL Ann Review 194 at 241–243, paras11.121–11.125.

6 *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

Concrete Singapore Pte Ltd).[7] Dissatisfied with that outcome, the appellant appealed – with some success, as the Court of Appeal reversed the trial judge's decision in part. The Court of Appeal found that damages for the respondent's claim were to be assessed on the basis of a minimum order of 30,000mt per month. More pertinently for present purposes, though, the Court of Appeal also held that the appellant's claim ought not to have been dismissed, for the respondent's attempt to terminate the contract was not legally justified: the respondent was, therefore, itself in breach of the contract.

5 Recognising that the right to discharge a contract for breach had "considerable practical value because it allows a party to *legitimately* escape from an unsatisfactory commercial situation",[8] the Court of Appeal pointed out that any attempt to exercise such a right carried a certain amount of risk, for, "if a party terminates the contract *without legal justification*, it will *itself* be in *breach* of contract"[9] [emphasis in original].

6 The appellant's argument stood on two limbs. Addressing the first, that the respondent was itself in breach of its obligations under the contract by suspending supply of sand to the appellant from 20 July 2006 and was thereby precluded from discharging the contract on account of the appellant's breaches, the Court of Appeal noted that the point had already been clarified by its earlier observations in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd*[10] ("*Jet Holding Ltd*"). In *Jet Holding Ltd*, the Court of Appeal had quoted with approval[11] the statement of the law set out by the English Court of Appeal in *State Trading Corp of India Ltd v M Golodetz*[12] ("*Golodetz*"), to wit:

> The fact that in the present case both parties had committed breaches before one of them elected to treat the contract as repudiated appears to make no difference whatever; nor the fact that (assumedly) both had been breaches of condition. If A is entitled to treat B as having wrongfully repudiated the contract between them and does so, then it does not avail B to point to A's past breaches of contract, whatever their nature. ***A breach by A would only assist B if it was still continuing when A purported to treat B as having repudiated the contract*** *and* ***if the effect of A's subsisting breach was such as to preclude A from claiming that B had committed a repudiatory breach. In other words, B***

7 [2008] 4 SLR(R) 848.

8 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [30].

9 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [31].

10 [2006] 3 SLR(R) 769.

11 *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 at [98]–[99].

12 [1989] 2 Lloyd's Rep 277 at 286.

> ***would have to show that A, being in breach of an obligation in the nature of a condition precedent, was therefore not entitled to rely on B's breach as a repudiation.*** [emphasis in italics in original; emphasis in bold italics added]

7 Applying those principles to the facts of this case, the Court of Appeal found that the appellant's argument on this point failed. The first prerequisite for the bar to apply was that the breach on the part of the party seeking to discharge the contract had to be a "continuing breach". In the Court of Appeal's judgment, "it would appear that the *first* prerequisite has been satisfied inasmuch as the breach by the Respondent *is* a *continuing* one as it had not furnished any sand to the Appellant since 20 July 2006"[13] [emphasis in original]. It seems, therefore, that by a "continuing breach", the Court of Appeal was referring to a non-performance that had not been made up for. So had supply of sand been resumed prior to the time when the respondent purported to discharge the contract on account of the appellant's breaches, the first prerequisite might, conceivably, not have been satisfied. But that was not the case here.

8 That, however, was not the end of the matter, for there were two prerequisites for the bar described in *Golodetz*[14] to apply. On the second prerequisite, the Court of Appeal was not convinced that the Respondent's "continuing breach" in suspending the supply of sand to the Appellant was a "condition precedent" to either of the Appellant's breaches upon which the Respondent was, purportedly, basing his entitlement to discharge the contract.

9 To recap, the respondent claimed to be discharging the contract on account of the appellant's (a) non- and late-payment of sums due and owing on the contract; and/or (b) under-ordering of sand. In the court's judgment, it could not be said that the continued supply of sand post-20 July 2006 was a condition precedent to the appellant's obligation to pay sums due and owing for sand that had previously been delivered.[15] This seems to be self-evident. Neither could it be said that such continued supply of sand post-20 July 2006 was a condition precedent to the appellant's obligation to order the minimum monthly amount of sand as was required under the contract. This, the Court of Appeal explained as follows:[16]

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13 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [48].

14 *State Trading Corp of India Ltd v M Golodetz* [1989] 2 Lloyd's Rep 277 at 286.

15 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [48].

16 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [49].

> [W]hen the Respondent refused to supply sand from 20 July 2006 onwards …, any order for sand placed by the Appellant would, *ex hypothesi*, have been an exercise in futility. In the circumstances, any breach by the Appellant with respect to under-ordering would have occurred prior to the Respondent's breach … Put simply, there was no relationship between the two breaches and, hence, the second prerequisite was not satisfied.

10 Though the language may be a little convoluted, this must be right. As a matter of construction of the contract, the respondent's obligation to supply sand must have been predicated on the appellant having made a *prior order* for such supply. If there had been no order (whether of at least the minimum quantity, or otherwise), there would have been no obligation to fill such order. So the obligation on the appellant to make a minimum order of sand each month could *not* be preconditioned on the respondent's continued supply of sand to fill such orders. Consequently, the appellant's first line of argument that the respondent was not legally entitled to discharge the contract had to fail.

11 That, however, was not the end of the appellant's case. Even if the respondent was not barred from discharging the contract on account of its own breach by suspending the supply of sand, the appellant argued that, in any event, its failure to pay and/or to order the minimum required volume of sand did not amount to breaches which entitled the respondent to discharge the contract. This entailed consideration as to whether these breaches by the appellant fell within Situation 2, Situation 3(a) or Situation 3(b) of *RDC Concrete*,[17] as summarised in *Man Financial (S) Pte Ltd v Wong Bark Chuan David*.[18]

12 Taking into account those principles, the Court of Appeal concluded that neither the appellant's breaches of the obligation to make payment, nor of the obligation to place a minimum order each month, were such as to entitle the respondent to justifiably discharge the contract for breach. As to the former, the Court of Appeal noted that there was "… no evidence that the series of delayed payments by the Appellant (coupled with the non-payments of the amounts owed in May and June 2006 [to the respondent]) constituted a renunciation of the Contract by [the appellant] (under Situation 2 of *RDC Concrete*)".[19] Had it been a case where the appellant had not paid the respondent *at all* throughout the duration of the contract, the Court of Appeal noted that it would have been more readily persuaded that non-payment to

17 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413.

18 [2008] 1 SLR(R) 663 at [153]–[158], and conveniently reproduced in *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [32]).

19 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [52].

that extent would have constituted a renunciation. But the present facts were far from that case. It seemed, therefore, that this breach could not be taken to have amounted to a renunciation by the appellant of the entirety of its obligations under the contract so as to bring the case between Situation 2 of *RDC Concrete*.

13 The Court of Appeal also noted[20] that "[t]he fact that the Respondent accepted (albeit late) payments from the Appellant suggests that *it* did not consider the conduct of the Appellant – taken as a whole – as constituting a renunciation of the Contract" [emphasis added]. This observation is somewhat ambiguous, as it is unclear whether the Court of Appeal used an objective or a subjective approach in ascertaining what the respondent had had in mind when it accepted the appellant's late payments. However, any suggestion that it might be appropriate to approach the ascertainment of a party's intentions from a subjective perspective ought to be rejected.

14 As the Court of Appeal stated in *RDC Concrete*,[21] where one contracting party, "by his words or conduct, simply *renounces* its contract in as much as it ***clearly conveys to the other party to the contract that it will not perform its contractual obligations at all***, that other party … is entitled to terminate the contract" [emphasis in italics in original; emphasis in bold italics added]. Whether particular acts or words amount to a renunciation, therefore, depends on whether those acts or words *clearly convey* the intention of the actor or speaker that it will not perform its part of the contractual bargain at all.

15 The degree to which such intention has been conveyed *clearly*, however, must depend on the degree to which the addressee *understands* that to have been the intention to be conveyed. What the addressee is taken to have understood, however, is not determined subjectively. Rather, consistently with the usual approach taken to ascertain intention and knowledge, it is determined objectively. That is, whether a particular act or statement is to be taken to be a renunciation or otherwise depends on whether the *reasonable man in the position of the addressee* would understand that act or statement as showing the actor or speaker's no longer intended to be bound by the contract.

20 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [52].

21 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [93].

16 Adopting the analysis of the House of Lords hearing an appeal from the Scottish Court of Session in *Forslind v Bechley-Crundall*,[22] Devlin J made it clear in the English High Court case of *Universal Cargo Carriers Corp v Citati* that:[23]

> A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renunciating [*sic*] must 'evince an intention' not to go on with the contract. The intention can be evinced either by words or by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renunciating [*sic*] has acted in such a way as to lead *a reasonable person* to the conclusion that he does not intend to fulfil his part of the contract. [emphasis added]

17 One should not, therefore, take the Court of Appeal's reference to *how* the respondent took the appellant's breach as introducing some element of subjectivity into the exercise of determining whether there had been a clearly evinced intention (on the part of the appellant) not to continue with the contract. (That said, it may be that the reference to the respondent's *subjective* intentions is relevant as regards a slightly different issue: that there had been no acceptance of such breach as being repudiatory so as to effect a discharge of the contract on the ground of renunciation, even if evidence of such repudiatory intent had been tendered.)

18 The Court of Appeal was also of the view that the appellant's obligation to effect timely payment within 60 days from supply of sand pursuant to cl 8 of the contract was not a "condition" within the meaning of Situation 3(a) of *RDC Concrete*:[24] "There was no evidence construing the Contract … in the light of the surrounding circumstances as a whole that cl 8 was intended by the parties to be a condition."[25] What the court had to do was to ascertain the intention of the contracting parties by construing the contract as a whole, including the contractual term in question, in light of the surrounding circumstances; and, on the facts of the case, the court concluded that given the brevity of cl 8 which merely provided that the terms of payment were to be "60 days from end of each month supply", the parties had *not* intended that *any* breach of cl 8 would entitle the innocent party to discharge the contract. It was more likely that the parties intended cl 8 to be applied more flexibly. Indeed, no evidence otherwise had been adduced by the respondent who was making the

22 1922 SC(HL) 173.

23 [1957] 2 QB 401 at 436.

24 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413.

25 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [53].

case that it was entitled to discharge the contract for such breach. That is to say, time of payment was not of the essence in the contract.[26]

19 For completeness' sake, although no submissions had been made on the point, the Court of Appeal pointed out[27] that time could not have been made of the essence merely by the appellant have been notified by the respondent of its insistence on timely payment (by way of a letter dated 8 September 2006). The Court accepted the analysis in *Chitty on Contracts*[28] that allowing such a notice to make time of the essence when it was *not* of the essence to begin with was tantamount to permitting a unilateral variation of the contract. The effect of such notice, therefore, lay only in bringing to an end any possible impediment to repudiation of the contract that equitable doctrine might otherwise pose.[29]

20 The Court of Appeal next considered whether the appellant's failure to pay the sums due and owing for the May and June 2006 deliveries amounted to a breach that fell within Situation 3(b) of *RDC Concrete*.[30] It concluded that this failure "did *not* deprive the Respondent of substantially the whole benefit of the Contract that it was intended that the Respondent should obtain".[31] In consequence, the respondent was *not* entitled to rely on the appellant's breach of its payment obligations to justify its discharge of the contract.

21 The Court of Appeal then turned to the appellant's breach of its obligation to order a minimum quantity of sand every month. This obligation, contained in cl 2 of the contract, was construed by the court in light of the language and its surrounding context as contemplating

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26 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [55].

27 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [56].

28 *Chitty on Contracts* (Sweet & Maxwell, 30th Ed, 2008) vol 1 at para 21-017.

29 As was noted by Nourse LJ in *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1 at 12: "Before the Judicature Acts, equity's insistence that time was prima facie not essential to a contract for the sale of land was expressed either by granting specific performance to a party who was out of time or by restraining the other party from enforcing his consequential rights at law. Since the fusion of law and equity the view of equity has continued to prevail, but the authorities show that its patience is exhaustible. One example, a rare one, is where a party has delayed so long as to evince an intention not to be bound by the contract. In such a case the other party can without more treat the contract as repudiated … More commonly, equity will not allow the contract to be so treated unless the party in default has been given an opportunity to mend his ways. The only way in which that can be done is by giving him notice to comply within a reasonable time. Such a notice is invariably described as one making time of the essence of the contract …".

30 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413.

31 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [57].

a minimum monthly quantity of sand which the appellant was to order from the respondent, and which the respondent was then under a corresponding obligation to supply. Accordingly, it was not completely open to the appellant to decide how much sand it was to order, or not to order any sand at all.[32] Given the trial judge's finding that the appellant had, indeed, under-ordered and was thus in breach of cl 2, the Court of Appeal noted that breach of cl 2 had not been expressed as a ground for termination of the contract in the respondent's correspondence with the appellant as to its decision to discharge the contract. That correspondence had relied solely on the appellant's breach of its payment obligation. This raised the question as to whether the respondent was entitled to rely on the ground of breach of cl 2 when reliance had initially been upon some other ground, now found to have been insufficient to justify discharge (given the findings summarised earlier).[33]

22 Here, following the English decision of *Taylor v Oakes, Roncoroni, and Co*,[34] the Court of Appeal accepted that:[35]

> Although the innocent party must justify an election to terminate for breach of contract by the other party, the authorities clearly establish that any ground of termination which existed at the time of election may be relied upon.

23 However, this was subject to various qualifications. First, as was noted in *Panchaud Frères SA v Establissments General Grain Co*[36] ("*Panchaud Frères*"), the innocent party may be prohibited from relying on an alternate ground of termination if, in light of the innocent party's conduct, it would be unfair or unjust for him to do so.[37] This, the Court of Appeal accepted, was not some "inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs, negativing any liberty to blow hot and cold in commercial conduct" (as had been suggested by Winn LJ in *Panchaud Frères* itself), but was premised on the doctrines of waiver and estoppel.[38] Even so, there was yet another qualification which was pertinent to the facts of this case.

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32 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [60].
33 See paras 18–20 of this article.
34 (1922) 127 LT 267 at 269.
35 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [63].
36 [1970] 1 Lloyd's Rep 53.
37 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [65].
38 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [65].

24 Second, the innocent party might be prevented from changing its justification for a purported discharge of contract if it were the case that *had* the alternate justification been raised at the time of the purported election to discharge the contract, it would have been possible for the party in breach to have removed or rectified the problem completely.[39] That is, "… the innocent party will not be entitled to rely on a ground not raised at the time of termination if the party in breach could have rectified the situation had it been afforded the opportunity to do so".[40]

25 Accepting the trial judge's finding that the appellant had breached cl 2 of the contract, being a breach that had *not* been relied upon initially by the respondent to justify their discharge of the contract, the Court of Appeal concluded that the "usual rule" set out in *Taylor v Oakes, Roncoroni, and Co*[41] was inapplicable on account of the second qualification to that rule. In light of the evidence of a rising market in sand at the material time, the Court of Appeal accepted that had the respondent notified the appellant of its non-compliance with cl 2, on a balance of probabilities, the appellant would definitely have increased its orders to at least the minimum required level so as to prevent such breaches from continuing. With the rising market, there was no incentive for the appellant to continue to under-order. Absent any evidence otherwise, submissions to the contrary could only be mere speculation.[42] Accordingly, the respondent was *not* entitled to rely on the breach of cl 2 to justify its discharge of the contract.

26 One small question which the above analysis leaves unanswered, is the precise scope of the "cure" that might have been effected by the appellant, had it been notified of the problem with its having ordered too little sand for each month. Under the contract, it would appear that the appellant had to order a minimum quantity of sand *per month*. Consequently, it would not be possible for the respondent to inform the appellant about its failure to honour the minimum order requirement until the orders for the month had been made and totalled up. Therefore, the respondent would only be in a position to inform the appellant about its breach of the minimum order obligation *after* the monthly interval had elapsed. If so, there would, strictly speaking, never be any possibility for the appellant to "rectify" its breach in relation to orders of sand for the month that would have already elapsed. It would only be able to *avoid* making further breaches, moving forwards. If so, it

39 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [66].

40 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [67].

41 (1922) 127 LT 267 at 269 (reproduced at para 22 of this article).

42 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [72].

is unclear how or why it would not be open to the respondent to rely on the *antecedent* breach of the minimum-order obligation for the second qualification to the *Panchaud Frères* principle (as to the ability of the appellant to rectify the breach) could not apply to such antecedent breach.

27 Leaving that problem aside, the Court of Appeal also concluded[43] that, in any event, breach of cl 2 was not a breach of a "condition" as would fall within Situation 3(a) of *RDC Concrete*.[44] Neither had its breach deprived the respondent of substantially the whole benefit of the contract that it was intended that it should have. First, the minimum quantity of sand that was to be ordered was, the Court of Appeal held, only 30,000mt of sand *per* month and not the 40,000mt that the trial judge had held. This meant that the shortfall in orders was not as extreme as it would have been had the minimum order been at the higher figure.

28 Nor could it be said that the effect of the under-orders on the respondent's cash flow had deprived it of substantially the whole benefit of the contract. To establish this, the Court of Appeal was of the view that it was necessary, first of all, to construe the contract to ascertain precisely the benefit that the parties had intended for the respondent to obtain.[45]

29 Accordingly, the Court of Appeal found that the respondent was not justified in terminating the contract at all. It was therefore in breach of contract for having unjustifiably refused to perform its part of the contract and was, itself, in repudiatory breach. Such breach having been accepted by the appellant, it followed that the appellant was entitled to damages for the losses it sustained as a result of the *respondent's* repudiation of the contract. The Court of Appeal therefore ordered, ultimately, that the quantum of such damages, as with the quantum of damages payable to the respondent by the appellant for the appellant's breaches, were to be assessed by the Registrar should the parties be unable to come to an amicable settlement by themselves.

30 It not having been raised as to whether the parties had expressly intended the terms as to payment and minimum orders to be such that their breach were *never* to give rise to the possibility of discharge, it would, perhaps, have been inappropriate for the Court of Appeal to

43 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [74].

44 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413.

45 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [76]; reiterating a point made in *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 at [61]–[64].

consider what it would have decided had such a submission been made. But had such a submission been made, presumably, the Court of Appeal would have had occasion to put into play its observations set out in its grounds of decision handed down two months earlier in *Sports Connection*,[46] that:

> Consistently with Diplock LJ's views [in *Hongkong Fir*[47]] … it must surely be open to the parties to *expressly agree (in clear and unambiguous language)* that the term concerned can *never* give rise to a legal right to terminate the contract, *regardless of the consequences of the breach* of that particular term (*viz*, to agree to a warranty *expressly* intended by the parties). Such an agreement would, in our view, *clearly rebut* the *(initial presumption* that the term is an intermediate term. [emphasis in original]

31 As has been noted elsewhere,[48] this passage in *Sports Connection*[49] may signal what is, in effect, a move *back* to the "traditional" understanding of the relationship between the "condition-warranty" approach and the *Hongkong Fir*[50] "innominate term" approach as set out by the House of Lords in *Bunge Corp v Tradax SA*:[51]

> In *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* …, the Court of Appeal rediscovered and reaffirmed that English law recognises contractual terms which, upon a true construction of the contract of which they are part, *are neither* conditions *nor* warranties but are … 'intermediate'. A condition is a term, the failure to perform which entitles the other party to treat the contract as at an end. A warranty is a term, breach of which sounds in damages but does not terminate, or entitle the other party to terminate, the contract. An innominate or intermediate term is one, the effect of non-performance of which *the parties expressly or (as is more usual) impliedly agree* will depend upon the nature and the consequences of breach. … The first question is always, therefore, whether, upon the true construction of a stipulation and the contract of which it is part, it is a condition, an innominate term, or only a warranty. … Unless the contract makes it clear, either by express provision or by necessary implication arising from its nature, purpose, and circumstances … that a particular stipulation is a condition *or* a warranty, it is an innominate term, the remedy for a breach of which depends upon the nature, consequences and effect of the breach. [emphasis added]

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46 *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 at [50].
47 *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 70.
48 C H Tham & P W Lee, "Contract" in [2009] 10 SAL Ann Review 194 at 239–244, paras 11.116–11.125).
49 *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 at [50].
50 *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.
51 [1981] 1 WLR 711 at 717.

32 No further guidance as to whether this is truly the way forward was provided by the Court of Appeal in *Alliance Concrete*[52] and so it appears that not everything relating to the doctrine of discharge of contract by breach has been rendered cut and dried. But, given the centrality of the doctrine (or doctrines) to contract law, that, perhaps, is only to be expected.

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52 *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602.